STATE OF MICHIGAN

COURT OF APPEALS

THOMAS KRITZMAN and FRANCIS T. KRITZMAN,

Plaintiffs-Appellants,

v

REEBEL REVOCABLE FAMILY TRUST, ET AL.,

Defendants-Appellees.

UNPUBLISHED
September 21, 2001

No. 221443
Alpena Circuit Court
LC No. 97-002544-CH

THOMAS KRITZMAN and FRANCIS T. KRITZMAN,

Plaintiffs-Appellants,

v

WILLIAM J. SEFTON, a/k/a W. J. SEFTON, ET AL,

Defendants-Appellees.

No. 221444
Alpena Circuit Court
LC No. 94-000950-CH

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right from the trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(10), declaring defendants owners of the right to hunt on land acquired by plaintiffs at a state tax sale. We reverse and remand.

Docket No. 221444

The facts in these cases are not disputed. An unnamed grantor divided 400 acres of property in Alpena County. Various lots within two plats of the 400 acres were deeded to defendants.[1] The deeds conveying title to defendants included a provision granting defendants the right to hunt on the 400 acres.[2] In 1983, following litigation unrelated to the instant case, the trial court determined that the grant of hunting rights was valid. On appeal, this Court affirmed the trial court's decision. *Reeble v Sefton*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 1986 (Docket No. 73146).

Plaintiffs purchased two parcels from the original 400 acres at a state tax sale in May 1985.[3] Following the statutory redemption period, plaintiffs were deeded the property by way of a quit-claim deed dated May 27, 1986. On September 2, 1994, plaintiffs filed the first amended complaint seeking to quiet title. Following a protracted procedural history that need not be restated for the purpose of these appeals, the trial court dismissed the case for lack of progress in August 1996. However, before the case was dismissed for lack of progress, the trial court was presented with cross-motions for summary disposition pursuant to MCR 2.116(C)(10).

The two defendants advancing the motion argued that MCL 211.67b(2) protected their hunting rights from being extinguished once plaintiffs purchased the property from the state. In an order entered March 2, 1995,[4] the trial court granted summary disposition in favor of defendants. The trial court later ruled that its order applied to numerous other defendants named in the action.

Docket No. 221443

In 1997, plaintiffs filed a complaint to revive the prior action, attempting once again to quiet title over the same portion of property. In January 1999, presumably to facilitate appellate review of this case, plaintiffs filed a motion for summary disposition based on stipulated facts pursuant to MCR 2.116(A). Relying on its opinion and order granting summary disposition in Docket No. 221444, the trial court granted summary disposition in favor of defendants on April 6, 1999. After this Court issued an order dismissing plaintiff's claim of appeal for lack of

[1] The exact timing of the conveyances is unclear from the record.

[2] Specifically, the provision stated:

> Hunting and recreational rights shall be in common with other lot owners on the first parties (common grantors) lands in Section 1, T30, WR5E (i.e. the four hundred acres) said privileges to extend only to the grantee and his immediate family. Nothing contained herein shall limit grantor's use of their property or the granting of the same or other privileges to others.

[3] The prior owners of the land were delinquent in paying taxes on the property. According to the record, the state took possession of the property in 1982.

[4] The trial court's March 5, 1995 order was based on its three-page written opinion entered January 30, 1995.

jurisdiction on June 16, 1999, the trial court entered a corrective order on July 20, 1999. It is from this order that plaintiffs now appeal.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337 ; 572 NW2d 201 (1998). The trial court's original grant of summary disposition in 1995, on which its 1999 judgment was based, was issued pursuant to MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

On appeal, plaintiffs contend that the trial court erred in holding that defendants' hunting rights survived the state tax sale. We agree.

Section 72 of the General Property Tax Act, MCL 211.1 *et seq.*, sets forth the nature of title a purchaser acquires when purchasing land through a state tax sale. At the time plaintiffs purchased the property in 1985,[5] MCL 211.72 provided in pertinent part:

> The tax deeds *convey an absolute title to the land sold*, and constitute conclusive evidence of title, in fee, in the grantee, subject, however, to all taxes assessed and levied on the land subsequent to the taxes for which the land was bid off. [Emphasis supplied.]

In *Ottaco, Inc v Gauze*, 226 Mich App 646; 574 NW2d 393 (1997), this Court discussed the nature of the title conveyed to a purchaser through a state tax sale.

> A tax deed issued by the state to a tax sale purchaser conveys an "absolute title," subject only to the "taxes assessed and levied on the land subsequent to the taxes for which the land was bid off." MCL 211.72. This absolute title destroys and cuts off all previous liens and encumbrances. *Robbins v Barron*, 32 Mich 36, 39 (1875). However, a property owner who loses his property in a tax foreclosure sale is entitled to redeem that property from the tax sale purchaser within six months from the date the tax sale purchaser meets the statutory notice requirements contained in MCL 211.140. *Halabu v Behnke*, 213 Mich App 598, 602; 541 NW2d 285 (1995); MCL 211.141. This statutory right of redemption also extends to any person who holds a mortgage or other "lien on the property." MCL 211.141(1)(e).

[5] MCL 211.72 was subsequently amended by 1993 PA 202, effective October 19, 1993.

> If a person entitled to redeem the property fails to do so within thirty days after the expiration of the six-month redemption period, the county treasurer must record a copy of the notice and proof of service required under MCL 211.140, which record "shall be prima facie evidence in all courts and tribunals that the purchaser is the owner of the land under the purchase." MCL 211.142a.
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> In other words, failure to timely redeem serves as an effective bar to a challenge of the validity of the tax sale purchaser's title. *Price v Stark*, 259 Mich 407, 413-414; 243 NW 244 (1932); *Chandler v Clark*, 151 Mich 159, 183; 115 NW 65 (1908). [*Ottaco, supra* at 652-654.][6]

In *Frey v Scott*, 224 Mich App 304, 308; 568 NW2d 162 (1997), this Court observed that an easement on property is extinguished when the servient tenement is conveyed to the state because of delinquent taxes. See also *Mocieri v St Clair Shores*, 366 Mich 380, 384; 115 NW2d 103 (1962); *Young v Thendara, Inc*, 328 Mich 42, 54; 43 NW2d 58 (1950); but see MCL 211.67b(2).

In its 1995 judgment granting summary disposition in favor of defendants, the trial court characterized defendants' interest in the disputed property as a profit a prendre. A profit a prendre has been defined by this Court as "the right to acquire, by severance or removal from another's land, something previously constituting part of the land." *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 483; 578 NW2d 701 (1998); see also *VanAlstine v Swanson*, 164 Mich App 396, 405; 417 NW2d 516 (1987). In *St Helen Shooting Club v Mogle*, 234 Mich 60, 65; 207 NW 915 (1926), our Supreme Court expressly held that the right to hunt on another's land is properly classified as a profit a prendre.

The trial court erroneously concluded that defendants' hunting rights were not extinguished when the parcels at issue were forfeited to the state because of delinquent taxes and later sold at a tax sale. As this Court recognized in *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 78-79; 308 NW2d 440 (1981), an easement and a profit a prendre are virtually indistinguishable. Rather, the only distinguishing characteristic between the two interests is that a profit a prendre grants the holder "the right to remove." *VanAlstine, supra* at 405.

> [T]he term 'easement' is so used as to include within its meaning the special meaning commonly expressed by the term 'profit.' * * *
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> The difference [between the easement and the profit a prendre] does not exist in this country. Here we have 'easements in gross' as well as 'profits in gross.' Since we have both 'easements in gross' and 'profits in gross' and since

[6] Defendants do not dispute that they were provided notice that the state had seized the property or of the impending state tax sale. Defendants also do not dispute that plaintiffs provided notice of their purchase of the property.

> the rules with respect to both 'easements' and 'profits' can be stated in identical terms, it is much more convenient to use a single term to designate both interests rather than to use to the extent of annoying repetition the cumbersome phrase 'easements and profits.' [*Evans supra*, at 79, quoting Restatement of Property, § 450, Special Note, pp 2901-2902.]

Thus, the conveyance of the servient tenement to the state extinguished defendants' profit a prendre. In other words, because defendants' interest is analogous to an easement, it follows that defendants' hunting rights were extinguished on forfeiture of the property to the state and the subsequent sale to plaintiffs. As this Court observed in *Ottaco*, the absolute title of a tax deed "destroys and cuts off all previous liens and encumbrances." *Ottaco, supra* at 652.

Likewise, we agree with plaintiffs that the 1990 amendment to MCL 211.67b does not require a contrary result. Although raised by plaintiffs, the trial court did not expressly decide this issue. However, this Court may address a question of law not decided by the trial court where the facts necessary for its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). When plaintiffs purchased the property in 1985, MCL 211.67b provided:

> Notwithstanding any other provision of law, any land sold for taxes shall remain subject to any visible or recorded easement, right of way or permit in favor of the United States, the state or any political subdivision or agency thereof or any public authority or drainage district, or granted or dedicated for public use or for use by a public utility.

In 1990, the Legislature enacted 1990 PA 307, which added subsection (2) to MCL 211.67b. As amended, the statute provides:

> Notwithstanding any other provision of law, any land sold for taxes shall remain subject to any visible or recorded easement.[7]

The statute as amended took effect on December 14, 1990. Plaintiffs purchased the property at issue in the instant case in 1985, and were deeded title in 1986. In *Boyne City v Crain*, 179 Mich App 738, 746; 446 NW2d 348 (1989), this Court held that the 1964 amendment to § 67b, which created subsection (1), did not apply retroactively because to do so would result in the creation or taking away of vested property rights. *Id.* at 746. In rendering its holding, the Court referred to the well-settled rule that "statutes affecting property rights are presumed not to operate retrospectively." *Id.*, citing *Mary v Lewis*, 399 Mich 401, 414; 249 NW2d 102 (1976); see also *Sommerville v Sommerville*, 164 Mich App 681, 687; 417 NW2d 574 (1987). Specifically, the *Crain* Court opined:

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[7] According to the record, the trial court's judgment validating the grant of hunting rights to defendants by the common grantor was properly recorded.

> Indeed, were we to apply the statute retroactively, a great many property interests in this state would be disturbed as people who took title following tax sales did so believing that prior easements had been extinguished and would now have those easements resurrected. Accordingly, we believe it appropriate . . . to presume that the Legislature intended [MCL 211.67b(1)] to have prospective effect only. [*Crain*, supra at 746.]

We agree with plaintiffs that the 1990 amendment to MCL 211.67b should not operate retroactively. To hold otherwise would disturb "a great many property interests" since those who took title following a tax sale before December 14, 1990, did so believing that any existing easements were extinguished. See *Boyne City*, *supra* at 746; see also *Frey*, *supra* at 309. Therefore, because plaintiffs acquired the property well before 1990 PA 307 took effect, any interest defendants' had in the property was extinguished.

Accordingly, we reverse and remand for entry of an order quieting title in favor of plaintiffs. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Michael R. Smolenski